

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

United States of America

v.

Walter Deotis Foster

Crim. No. 4:04-cr-01039-TLW-1

Order

This matter is before the Court on Defendant's motion to appoint counsel to his case in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). He pled guilty to a drug charge and was sentenced as a guideline career offender to 204 months imprisonment. His career offender predicate convictions were for failure to stop for blue light, assault with intent to kill (AWIK), and distribution of powder cocaine. PSR ¶¶ 23, 35, 39, 42. Even without the failure to stop conviction, the record reflects that he would remain a career offender under the guidelines in light of his predicate convictions for AWIK and cocaine distribution.

Even assuming that *Johnson* applies to the guidelines,¹ Defendant would not be entitled to relief, as the Fourth Circuit has concluded that an erroneous application of the sentencing guidelines, including a career offender designation, is not cognizable on collateral review pursuant to § 2255. *See United States v. Foote*, 784 F.3d 931, 936 (4th Cir. 2015). Thus, the Court concludes that no basis exists to appoint counsel in this case. Accordingly, his motion to appoint counsel, ECF No. 90, is **DENIED**.

¹ The Court notes that this issue has not been decided by the Fourth Circuit, and at least one Court of Appeals has concluded that *Johnson* does not apply to the guidelines. *See United States v. Matchett*, 802 F.3d 1185, 1194–96 (11th Cir. 2015) (concluding that *Johnson* does not apply to the guidelines because they do not prohibit conduct or fix punishments).

IT IS SO ORDERED.

s/ Terry L. Wooten
Terry L. Wooten
Chief United States District Judge

May 18, 2016
Columbia, South Carolina